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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 307

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, APPELLANT,

vs.

PHŒNIX INDEMNITY CO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

FILED AUGUST 7, 1929

(34,438)

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[fol. 1]

IN SUPREME COURT OF NEW YORK, COUNTY OF RICHMOND

PHŒNIX INDEMNITY CO., Plaintiff,

against

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, Defendant

Controversy Submitted under Sections 546 to 548 of the Civil Practice Act

Plaintiff and defendant above named, being parties to a certain controversy between them, do hereby agree upon the following as a statement of the facts out of which their controversy arises, and do hereby submit said controversy to this court for decision and for judgment in favor of plaintiff or defendant, as this court shall determine.

AGREED STATEMENT OF FACTS—Filed April 2, 1928

1. At all times hereinafter mentioned plaintiff was and still is a domestic insurance corporation.

2. At all times hereinafter mentioned defendant was and still is a domestic railroad corporation with an office for the transaction of its business in the County of Richmond, State of New York.

3. On and prior to February 24, 1927, one Joseph Per-
[fol. 2] roth was in the employ of one Ove Anderson, doing business under the name and style of Economy Meat Market.

4. Said Ove Anderson, in compliance with the provisions of the New York Workmen's Compensation Law, had insured himself with plaintiff against liability for compensation for any injury to any of his employees, including said Perroth.

5. On February 24, 1927, and while acting within the scope of his employment by said Anderson, said Perroth

was struck by a train owned and operated by defendant, receiving bodily injuries which caused his death.

6. Said Perroth was struck and injured as aforesaid solely by reason of the negligence of defendant without any negligence of his contributing thereto.

7. Said Perroth left him surviving a dependent, to-wit, his widow.

8. Thereafter, but prior to the institution of this action, the Administratrix of the estate of said Perroth brought suit against defendant herein to recover monetary damages for the death of said Perroth.

9. Said suit was settled and discontinued before trial by the defendant therein, which is the defendant herein, paying to said Administratrix the sum of $15,000, receiving a general release therefor. Said sum of $15,000 is in excess [fol. 3] of the amount which said dependent of said Perroth would have been entitled to by way of compensation if claim had been made by her, pursuant to the New York Workmen's Compensation Law.

10. Thereafter, but prior to the institution of this action, and pursuant to subsections 8 and 9 of Section 15 of the New York Workmen's Compensation Law, two $500 awards were made in favor of the Treasurer of the State of New York and jointly against said Ove Anderson and plaintiff herein. Upon the date of said Perroth's death as aforesaid, subsections 8 and 9 of Sections 15 of said Workmen's Compensation Law provided as follows:

"§15. Schedule in Case of Disability.—The following schedule of compensation is hereby established:

* * * * * * *

"8. Permanent total disability after permanent partial disability. If an employee who has previously incurred permanent partial disability through the loss of one hand, one arm, one foot, one leg, or one eye, incurs permanent total disability through the loss of another member or organ, he shall be paid, in addition to the compensation for permanent partial disability provided in this section and after the cessation of the payments for the prescribed

period of weeks special additional compensation for the remainder of his life to the amount of sixty-six and two-thirds per centum of the average weekly wage earned by him at the time the total permanent disability was incurred. Such additional compensation shall be paid out of a special fund created for such purpose in the following manner: [fol. 4] The insurance carrier shall pay to the state treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of five hundred dollars. The state treasurer shall be the custodian of this special fund, and the commissioner shall direct the distribution thereof.

"9. Expenses for Rehabilitating Injured Employees.—An employee, who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the state department of education is being rendered fit, to engage in a remunerative occupation, shall receive additional compensation necessary for his rehabilitation, not more than ten dollars per week of which shall be expended for maintenance. Such expense and such of the administrative expenses of the state department of education as are properly assignable to the expense of rehabilitating employees entitled to compensation as a result of injuries under this chapter, shall be paid out of a special fund created in the following manner: The employer, or if insured, his insurance carrier, shall pay into the vocational rehabilitation fund for every case of injury causing death, in which there are no persons entitled to compensation, the sum of five hundred dollars. The state treasurer shall be the custodian of this special fund.

"Disbursements from the vocational rehabilitation fund for the additional compensation provided for by this section shall be paid by the state treasurer upon vouchers signed by the industrial commissioner or deputy industrial commissioner.

"Disbursements from the vocational rehabilitation fund for administrative expenses of the state department of education shall be paid by the state treasurer upon vouchers signed by the commissioner of education or the deputy commissioner of education.

"Prior to the first days of January, April, July and Oc-
[fol. 5] tober there shall be submitted to the state board of estimate and control by the commissioner of education for its approval an estimated budget of administrative expenses of the state department of education which it is proposed to charge to the vocational rehabilitation fund for the succeeding three months. There may not be expended from the said fund for such administrative expenses, more than the amounts specified in such budget for each item of expenditure, except as authorized by the board of estimate and control."

11. Said awards were paid by plaintiff to the said State Treasurer on December 27, 1927.

12. No part of the amount of said awards has been repaid plaintiff by defendant or anyone on its behalf although proper demand has been made therefor.

13. At all times mentioned herein, Section 29 of the New York Workmen's Compensation Law provided, and still provides, among other things, as follows:

"* * * In case of the payment of an award to the state treasurer in accordance with subdvisions eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased."

The questions submitted to this Court for decision are:

I. Under the above facts, was the State Treasurer entitled to the awards made in his favor and paid by plaintiff, as stated in Paragraphs 10 and 11, supra?

II. If the first question is answered in the affirmative, [fol. 6] is plaintiff entitled to recover the amount of said awards from defendant by reason of §29 of the New York Workmen's Compensation Law?

If both questions are answered in the affirmative, then judgment is to be rendered in favor of plaintiff and against

defendant for $1,000 with interest from December 27, 1927, with costs.

If either question is answered in the negative, then judgment is to be rendered in favor of defendant and against plaintiff, dismissing this submission of controversy, with costs.

Phœnix Indemnity Co., by Vernon B. Chittenden, Plaintiff. (Seal.) The Staten Island Rapid Transit Railway Co., by Robert B. Luckey, Defendant. (Seal.)

[fols. 7 & 8] *Duly sworn to by Vernon B. Chittenden and Robert B. Luckey. Jurat omitted in printing.*

[fol. 9] [Title omitted]

Vernon B. Chittenden, being duly sworn, deposes and says that he is the vice-president of Phœnix Indemnity Co., the corporation plaintiff in the above-entitled action; that he is familiar with the subject matter of the within controversy and that said controversy is real and the submission thereof upon an Agreed Statement of Facts is made in good faith and for the purpose of determining the rights of the parties.

Vernon B. Chittenden.

Sworn to before me this 30th day of March, 1928. Edna M. Gordon, Commissioner of Deeds, City of New York. New York County Clerk's No. 78. New York City. Register's No. 39-0. Kings County Clerk's No. 129. Kings County Register's No. 129. Com. expires Mar. 1, 1930.

[File endorsement omitted.]

Certificate to foregoing paper omitted in printing.

[fols. 10 & 11] Reporter's certificate to opinion omitted in printing.

Judge's certificate to reporter omitted in printing.

[fol. 12] IN COURT OF APPEALS OF NEW YORK

PHŒNIX INDEMNITY CO., Respondent,

v.

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, Appellant

(Decided May 28, 1929)

Appeal by the Defendant from a Judgment of the Appellate Division, in the Second Judicial Department, in Favor of the Plaintiff Upon a Submitted Controversy.

Frederick H. Wood for appellant.

Jeremiah F. Connor for respondent.

OPINION—Filed Aug. 6, 1929

HUBBS, J.

In 1927 Joseph Perroth was an employee of one Anderson, who had insured himself with the plaintiff insurance company against liability in compliance with the provisions of the Workmen's Compensation Laws (Cons. Laws, ch. 67, as amended). Perroth, while acting within the scope of his employment, was killed through the negligence of the defendant, without any negligence on his part. He left him surviving a dependent, his widow. The administratrix of Perroth commenced an action against the defendant to recover damages because of the negligence of the defendant in causing Perroth's death. That action was settled by the defendant paying to the administratrix the sum of fifteen thousand dollars and receiving a general release. The amount paid by the defendant was in excess of the amount [fol. 13] which said dependent widow, Perroth, would have been entitled to receive as compensation under the provisions of the Workmen's Compensation Law.

Thereafter, and prior to the commencement of this action, two awards of five hundred dollars each were made in favor of the State Treasurer against Anderson and the plaintiff, his insurer, jointly, under subdivisions 8 and 9 of section 15 of the Workmen's Compensation Law. The awards were paid to the State Treasurer by the insurer, the plaintiff herein.

This action is brought pursuant to section 29 of the Workmen's Compensation Law, as amended by chapter 615 of the Laws of 1922, to recover from the defendant the sum so paid by the plaintiff to the State Treasurer. In an agreed statement of facts two questions were submitted to the Appellate Division for decision:

First. Was the State Treasurer entitled to the awards made in his favor and paid by the plaintiff?

Second. If the first question is answered in the affirmative, is the plaintiff entitled to recover the amount of said awards from the defendant by reason of section 29 of the Workmen's Compensation Law?

The Appellate Division answered both questions in the affirmative and judgment was entered in favor of the plaintiff.

At the time of said employee's death, the sections of the Workmen's Compensation Law in question read as follows:

[fol. 14] "§ 15. Schedule in case of disability. The following schedule of compensation is hereby established: * * *

"8. Permanent total disability after permanent partial disability. If an employee who has previously incurred permanent partial disability through the loss of one hand, one arm, one foot, one leg, or one eye, incurs permanent total disability through the loss of another member or organ, he shall be paid, in addition to the compensation for permanent partial disability provided in this section and after the cessation of the payments for the prescribed period of weeks special additional compensation for the remainder of his life to the amount of sixty-six and two-thirds per centum of the average weekly wage earned by him at the time the total permanent disability was incurred. Such additional compensation shall be paid out of a special fund created for such purpose in the following manner: The insurance carrier shall pay to the state treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of five hundred dollars. The state treasurer shall be the custodian of this special fund, and the commissioner shall direct the distribution thereof."

9. (Provides for the expense of rehabilitating injured employees and requires the insurance carrier to pay to the

State Treasurer the sum of five hundred dollars under the same terms as contained in subdivision 8 above.)

"§ 29. Subrogation to remedies of employees. * * * In case of the payment of an award to the state treasurer in accordance with subdivisions eight and nine of section fif- [fol. 15] teen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased."

The contention of the appellant that the deceased left a dependent widow surviving him who would have been entitled to compensation under the statute if she had so elected and that, therefore, no awards should have been made to the State Treasurer under subdivisions 8 and 9 of section 15 has been conclusively decided by this court contrary to the contention of the appellant. (Matter of State Treasurer v. West Side Trucking Co., 233 N. Y. 202; Matter of State Treasurer v. Niagara Falls Power Co., 241 N. Y. 521; Matter of Chrystal v. United States Trucking Corp., 250 N. Y. 566.)

It is urged by the appellant that the Legislature did not have the power to create, by the amendment of section 29 in 1922, a cause of action against a third person through whose negligence an employee covered by the Workmen's Compensation Law met his death, because said amendment is in contravention of the due process clause of the State and Federal Constitutions and also denies to the appellant the equal protection of the law.

The reasons for the enactment of the Workmen's Compensation Law and the humanitarian purpose which it was enacted to further have been stated by this court and the United States Supreme Court. It has been treated as an enlightened forward movement, based upon social experi- [fol. 16] ence, enacted to do away with the harsh and often unjust rule of the common law that there could be no liability for injury without fault and to substitute in its place the more just and equitable rule making injuries received by employees without fault on the part of the employer a liability of the industry and adding the expenses, which are

first sustained by the employer, to the cost of production to be ultimately borne by the public at large. (New York Central R. R. Co. v. White, 243 U. S. 188; Matter of Jensen v. Southern Pacific Co., 215 N. Y. 514. Those cases established that the Workmen's Compensation Law is constitutional.

At the time they were decided the amendment of 1922 to section 29, which provides for an action by the employer or insurance carrier against one who has negligently caused the death of an employee to recover the sums paid to the State Treasurer, had not been enacted.

The constitutionality of subdivisions 8 and 9 of section 15 was passed upon in an action by the State Treasurer against the employer and the carrier in State Treasurer v. Sheehan Co. (236 N. Y. 579; affd., sub nom. Sheehan Co. v. Shuler, 265 U. S. 371) and in New York State Railways v. Shuler (265 U. S. 379) before the amendment of 1922 to section 29, in question here.

In those cases it was urged, as it is in this, that subdivisions 8 and 9 of section 15, or the provisions of the statute to like effect in existence at the time of the decisions in those cases, were in conflict with the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. In the case of Sheehan Company v. Shuler (supra) the United States Supreme Court, re- [fol. 17] ferring to subdivisions 8 and 9 of section 15, said:

"The substance of these two provisions is that when an injury causes the death of an employee leaving no beneficiaries, the employer or other insurance carrier shall pay the state treasurer the sum of $500 for each of two special funds: one to be used in paying additional compensation to employees incurring permanent total disability after permanent partial disabilities; and the other, in the vocational education of employees so injured as to need rehabilitation. The use of such special funds for such purposes is an additional compensation to the employees thus injured, over and above that prescribed as the payments to be made by their immediate employers. Such additional compensation is neither unjust nor unreasonable. Thus, an employee, who, having lost one hand in a previous accident,

thereafter loses the second hand, is, obviously, not adequately compensated by the provision requiring his employer to make payment for the loss of the second hand, independently considered; the total incapacity finally resulting from the loss of both hands working much more than double the injury resulting from the loss of each separate hand, considered by itself. In such a case, however, as in the case of an injury requiring vocational rehabilitation, it is the theory of the law that such additional compensation to the injured employee should not be required of the particular employer in whose service the injury occurred, but should be provided out of general funds created by payments required of all employers when injuries resulting in the death of their own employees leaving no beneficiaries, do not otherwise create any liability under the Compensation Law."

[fol. 18] The Legislature, in carrying out the benevolent purpose of the statute, by its amendment adding subdivisions 8 and 9 of section 15, furnished additional protection to the class of employees specified therein engaged in hazardous occupations and provided that the fund for furnishing such additional protection should be contributed by employers coming under the act, or their insurance carriers, in cases where they were not liable to pay directly to dependent survivors of the deceased employees. The same principles which inspired the enactment of the Workmen's Compensation Law, and have animated the courts in construing it, were cogent reasons for holding the amendments embodied in subdivisions 8 and 9 of section 15 to be constitutional.

The State has adopted a policy which provides that the unfortunate employees who have suffered the injuries described are entitled to the compensation provided, in order that they may become rehabilitated and not become dependent, or wards of the State. In the first instance, the burden of furnishing funds to carry out the purposes of the statutes was placed upon the employers engaged in hazardous occupations, without regard to fault on their part or whether the fund contributed by a particular employer was to be used for the benefit of employees injured in his business.

Thereafter, the Legislature, in 1922, amended section 29, to provide, in substance, that where an employer or his insurance carrier has been obliged to contribute to such funds, he may recover from the wrongdoer who, by his wrongful act, has made such contribution necessary, the amount so contributed. It is an attempt to remove the burden from one who has not committed a wrong and to [fol. 19] place it upon one who, by his wrongful act, has made the payment into the funds necessary.

If it be conceded that the State, in establishing the funds for the benefit of the class of employees referred to in order that they may not become dependent and a burden on the State, has acted within its constitutional jurisdiction, then it seems to us that it must follow that placing the burden of supplying such funds upon the wrongdoers who make the contribution to the funds necessary is clearly within the constitutional power of the Legislature.

The Supreme Court, in the case of New York Central R. R. Co. v. White (supra) said: "One of the grounds of its (the public's) concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime." And in Mountain Timber Co. v. Washington (243 U. S. 219) the same court said: "It hardly would be questioned that the State might expend public moneys to provide hospital treatment, artificial limbs, or other like aid to persons injured in industry, and homes or support for the widows and orphans of those killed." The argument that the State cannot lawfully place that burden upon those who are directly and wrongfully responsible for it is not convincing. Where the death of an employee covered by the Workmen's Compensation Law is wrongfully caused by a third person, and the deceased leaves dependents who recover compensation from the employer or his insurance carrier, the employer or his insurance carrier who has paid such compensation may, under the provisions of section 29, recover against the wrongdoer the damages caused by his wrongful act, even though the recovery exceeds the amount of compensation paid to the dependents of the deceased employee. (Travelers Insurance Co. v. Padula Co., 224 N. Y. [fol. 20] 397; Matter of Zirpola v. Casselman, Inc., 237 N.

Y. 367; Travelers Insurance Co. v. Brass Goods Mfg. Co., 239 N. Y. 273.) The right to recover over against the wrongdoer, under the amendment of said section involved in this case, creates merely an additional liability against the wrongdoer for the amount paid to the State Treasurer under subdivisions 8 and 9 of section 15.

Section 130 of the Decedent State Law (Cons. Laws, ch. 13), and the statutes which it superseded conferring the right to recover damages for wrongful death, created a right of action unknown to the common law. (Whitford v. Panama R. R. Co., 23 N. Y. 465.) States having similar statutes "differ as to who may sue, for whose benefit, and the measure of damages." (New York Central R. R. Co. v. White, supra.)

In Travelers Insurance Co. vs. Padula Co. (supra) this court said:

"A civil liability and the right to recover damages for a wrongful act or neglect causing death are created solely by statute. At common law no civil action would lie for causing the death of a human being. Legislative enactment is the exclusive source and boundary of the liability and the remedy. It may create the cause of action, define the period of its existence, and the party by whom and the method in which it shall be enforced and prescribe the measure of damages and the beneficiaries."

All persons are under an obligation to the State not to wrongfully cause the death of one of its citizens, and the State may lawfully enact that if that obligation is violated the one so violating it shall pay to the State a sum not unjust or unreasonable to enable it to carry out the provisions of the Workmen's Compensation Law. The fact that the obligation is made to rest first upon the employer or his insurance carrier does not affect the right, but only provides for the manner in which the sum is ultimately to be collected from the wrongdoer. That practice has been adapted in many different actions for penalties, where the [fol. 21] proceeds, in part, go to the State.

The manner of collecting penalties and the disposition of the sums collected are matters which rest in the discretion of the Legislature, and it may lawfully make such disposi-

tion thereof as it determines may best carry out the purpose of a particular statute. (Missouri Pacific Ry. Co. v. Humes, 115 U. S. 512; Miami Copper Co. v. State, 7 Ariz. 179; Boyd v. Missouri Pacific Ry. Co., 249 Mo. 110.) The State of Alabama enacted a statute allowing punitive damages to be assessed against an employer for the mere negligence of an employee, resulting in death. In Pizitz Dry Goods Co. v. Yeldell (274 U. S. 112) the statute was held to be constitutional and the court said:

"Lord Campbell's Act and its successors, establishing liability for wrongful death where none existed before, the various Workmen's Compensation Acts, imposing new types of liability, are familiar examples of the legislative creation of new rights and duties for the prevention of wrong or for satisfying social and economic needs. Their constitutionality may not be successfully challenged merely because a change in the common law is effected. As interpreted by the state court, the aim of the present statute is to strike at the evil of the negligent destruction of human life by imposing liability, regardless of fault, upon those who are in some substantial measure in a position to prevent it. We cannot say that it is beyond the power of a legislature, in effecting such a change in common law rules, to attempt to preserve human life by making homicide expensive. It may impose an extraordinary liability such as the present, not only upon those at fault but upon those [fol. 22] who, although not directly culpable, are able nevertheless, in the management of their affairs, to guard substantially against the evil to be presented."

In some States the statutes giving a right of action for wrongful death impose a penalty, which may be recovered for the benefit of the survivors named in the statutes. (Boyd v. Missouri Pacific Ry. Co. supra; Raisor v. Chicago, etc., R. R. Co., 215 Ill. 47, and cases cited in 8 Ruling Case Law, title Death, §118.) If the State may lawfully impose a penalty payable to the survivors of the deceased, it may impose an additional penalty, payable to the State itself, to enable it to carry on a State function. The fact that the statute limits the liability of one wrongfully causing he death of another to the payment of a pen-

alty only in case the one wrongfully killed is an employee under the Workmen's Compensation Law cannot be complained of by the defendant. That the liability of the defendant might legally have been made greater is not a reason why its legality as enacted should not be maintained. (People v. Braunstein, 248 N. Y. 308; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571.)

It is urged by the appellant that the desirability of establishing the funds under subdivisions 8 and 9 of section 15 does not justify a statute which compels it to pay one thousand dollars into the funds, because neither it nor the one it injured will benefit from such funds. It is a sufficient answer that the State will be benefited by such payment and that the defendant's wrongful act placed upon the employer or his carrier the burden, in the first instance, of [fol. 23] making the payment into the funds. (Sheehan Co. v. Shuler, supra.)

The statute does not contemplate the taking of property without due process of law. The defendant may avail itself of any defense which it has or ever had. It has a right to establish, if it can, that there could have been no recovery in the negligence action which it settled, and may test the validity of the awards against the insurance carrier by any defense which the carrier could have interposed, as it was not a party to that proceeding and is not bound thereby.

Subdivisions 8 and 9 of section 15 and section 29, construed together, and in connection with the other provisions of the Workmen's Compensation Law, are "component parts of a single scheme" and constitute a valid constitutional statute. The wrongdoer is made responsible for his wrongful act, the statute promotes the public welfare, and lawfully imposes a penalty upon the wrongdoer. It is uniform, in that it gives a right of action against all who wrongfully cause the death of an employee specified in the statute.

The judgment of the Appellate Division should be affirmed with costs.

IN COURT OF APPEALS OF NEW YORK

DISSENTING OPINION—Filed Aug. 6, 1929

LEHMAN, J. (dissenting):

The Workmen's Compensation Law was enacted by the Legislature, pursuant to authority expressly conferred by the Constitution of the State, article 1, section 19. Every employer subject to its terms must secure compensation to his employees and pay or provide compensation for their [fol. 24] disability or death arising out of and in the course of the employment. The industrial relations created by the employment justified the Legislature in substituting a more complete and equitable system of compensation for the inadequate remedy afforded at common law or by earlier statute for injury or death caused by an employer. Because of these industrial relations a new form of liability, though constituting a new burden, might be imposed upon the employer, perhaps to be borne ultimately by the public at large as an expense of the industry. (N. Y. Central R. R. Co. v. White, 243 U. S. 188; Matter of Jensen v. Southern Pacific Co., 215 N. Y. 514.)

The Legislature, instead of imposing upon each employer the entire responsibility for losses occurring in his own plant or work, might impose the burden upon the industry through a system of occupational taxes or enforced payments to an industrial fund required of persons connected with the industry. (Mountain Timber Co. v. Washington, 243 U. S. 219.) In this State the Legislature has provided that for certain disabilities payment of compensation or extra compensation should be made out of special funds created for that purpose, rather than by the individual employer. (Workmen's Compensation Law, §15, subd. 8 and 9.) Into each of such funds "the insurance carrier shall pay to the State Treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of five hundred dollars." Under identical conditions all employers are required to contribute to these special funds and "the payments thus required are not [fol. 25] unfair and unreasonable in amount. The aggregate for the two funds is one thousand dollars. This is much less than the maximum payment which may be re-

quired according to the scales in case the employee leaves survivors entitled to death benefits, and seems not to exceed, if it equals, the average amount of the payments required in such cases." For these reasons the constitutionality of these provisions has been sustained both in this court and in the Supreme Court of the United States. Sheehan Co. v. Shuler, 265 U. S. 371, affg. State Treasurer v. Sheehan Co., 236 N. Y. 579; Matter of State Industrial Commission v. Newman, 222 N. Y. 363; N. Y. State Railways v. Shuler, 265 U. S. 379.)

Where the employee's disability or death resulted from the wrongful act of a party not in the same employ the liability of such party remained substantially unchanged. The injured employee, or, in case of his death, his dependents, might elect to pursue any remedy afforded by law against such party. If the employee, or his dependents, elect to take compensation under the Workmen's Compensation Law, then it is provided that the awarding of compensation shall operate as an assignment of the cause of action against such other party "to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation, and if he elect to proceed against such other, the state insurance fund, person, association, corporation, or insurance carrier, as the case may be, shall contribute only the deficiency, if any, between the amount of the re-[fol. 26] covery against such other person actually collected, and the compensation provided or estimated by this chapter for such case." (Workmen's Compensation Law, §29.)

It is true that, as we have construed the section, it provides "that a party who negligently kills an employee under the act shall be liable to the dependents of the employee, * * * and not to his next of kin," and to that extent creates a new action in substitution for the action for causing death by negligence as defined by section 1902 of the Code of Civil Procedure. Since, however, the Legislature might have originally created a cause of action for the death of an employee in favor of the dependents rather than the next of kin of the deceased, the wrongdoer has no substantial ground for complaint. (Travelers Ins. Co. v. Padula

Co., 224 N. Y. 397.) There the Legislature exercised its undoubted power to create and define the liability and the remedy for causing the death of a human being. That power is not based upon its right to provide compensation for the disability or death of an employee as a liability on the part of his employer or a burden upon the industry. The considerations which have led the courts to sustain the legislation creating such a right to compensation have no application to legislation creating a liability against a wrongdoer, not in the same employ as the employee who has been injured or killed.

In 1922 the Legislature amended section 29 of the Workmen's Compensation Law by providing that "In case of the payment of an award to the state treasurer in accordance [fol. 27] with subdivisions nine and ten of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased." As stated in the majority opinion, "it is an attempt to remove the burden from one who has not committed a wrong, and to place it upon one who, by his wrongful act, has made the payment into the funds necessary."

That statement seems, as a matter of first impression persuasive that the Legislature must have power to place ultimate liability upon the person but for whose wrongful act no payment would have been required of the employer. Analysis, however, demonstrates, I think, that its persuasive force is illusory. The defendant has already paid to the dependent of the deceased more than the compensation provided by the Workmen's Compensation Law. If recovery or settlement had been less the dependent would have been entitled to receive payment of the deficiency from the employer or insurance carrier. In such case the employer or insurance carrier would not have been entitled to any repayment of the deficiency from the wrongdoer nor would such employer or insurance carrier have been compelled to make any payment to the State insurance fund. The wrongful act of the defendant has not caused any depletion of the insurance fund

The employer or insurance carrier is compelled to make a payment to such a fund only because the Legislature has [fol. 28] so decreed as part of its scheme of making payment of compensation to employees a burden on the industry as a whole. The defendant is not in the same employ as the deceased or as the persons who may subsequently be entitled to receive compensation from the fund for other injuries. The liability of the employer to make payments to such a fund is not in any true sense a damage flowing from the defendant's wrongful act. It is a payment in the nature of an industrial tax which the Legislature has imposed upon employers for the purpose of creating an industrial fund for the benefit of those who are part of the industry. The contingency upon which such liability is imposed is an injury of an employee "causing death in which there are no persons entitled to compensation". The defendant's wrong has caused the death. It has paid to the dependents and next of kin of the deceased the full compensation or damages allowed to them by statute for such death. Only because that payment was adequate to meet all claims for compensation which would otherwise have been a liability of the employer has the employer become subject to the tax, the required payment into the insurance fund. The question before us is not whether the Legislature may compel a wrongdoer to make good all damages caused by his wrongful act, but whether the Legislature may shift to the defendant the ultimate liability for the payment, in the nature of an industrial tax, imposed upon the employer.

Since the defendant stands in no industrial relation to the deceased or to the employee or to those who may receive compensation from the insurance fund, it seems to me quite [fol. 29] clear that the liability which the Legislature has attempted to impose may not be sustained upon analogy to an industrial tax. The additional cause of action in favor of an employer who has been compelled to make a payment into the insurance fund may be sustained, if at all, only as the result of the exercise of a legislative power to create a new cause of action for a penalty or damages for causing death by negligence. These powers are undoubtedly broad, yet they are not, I think, unlimited. Some reasonable basis must be found, I think, for the imposition of the penalty, or for the creation of a cause of action for damages

and there must be some reasonable basis for the classification upon which the creation of the new cause of action for damages or penalty is based. I fail to find such a basis in the present case.

The cause of action for a penalty or damages which the Legislature has attempted to create, arises not in every case where death is caused by wrongful act, nor even in every case where death is so caused and the deceased left no dependents or next of kin entitled to damages. Indeed in this case a dependent survived but the surviving dependent is not entitled to compensation under the Workmen's Compensation Act because she has already received adequate payment from the defendant. In other words, here a cause of action for a penalty or damages has been created by the Legislature because the defendant has paid to the surviving dependent full compensation for the injury caused by its wrong. If the defendant had failed to pay such damages and consequently the defendant had been entitled to the compensation from the employer, the defendant would not [fol. 30] have been liable for any penalty or damages beyond those which the dependent or next of kin might have recovered in an action against the defendant.

It is true that in such case the employer also would have been compelled only to pay compensation to the surviving dependent and would not have been compelled to pay an additional sum into the State insurance fund. If this factor were absent I assume that no one would seriously contend that the Legislature ever would or could have created an additional liability against a wrongdoer causing death in the contingency that the wrongdoer had already made full payment in damages to the dependents or next of kin of the person killed.

As I have already pointed out, the provision of the statute for payment by the employer into the insurance fund has been sustained on the ground that it is in the nature of an industrial tax imposed on all employers in the contingency of the death of an employee where the employer cannot be called upon to make any payment of compensation to any dependent of the person killed. It bears equally upon all employers under the same circumstances and is reasonable in amount, since it "seems not to exceed, if it equals, the average amount of the payments required" if a deceased

left surviving dependents entitled to death benefit. Here, on the contrary, the additional liability does not bear equally upon all wrongdoers causing death where no dependent or next of kin survive, and it is not reasonable in amount, for it is imposed in those cases where the damages already paid by a defendant exceed the rate of compensation to which a dependent survivor would be entitled under [fol. 31] the statute. It seems to me that the Legislature could not, after such payment, impose upon the defendant an additional liability in order to shift to the wrongdoer the ultimate burden of repaying to the employer the amount which the employer was required to pay into the insurance fund. None of the grounds upon which the courts have sustained the statute requiring such payment from the employer applies to the liability for repayment imposed upon this defendant. The Legislature could not have imposed upon the defendant a liability to make a direct payment into the insurance fund in the contingency that it had fully paid compensation to all survivors of the person whose death defendant caused. Such a classification would be so clearly unreasonable that it would not even bear any analogy to any reported cases. The Legislature has, I think, attempted to do by indirection what it could not do directly. That, I think, is equally beyond its powers.

For these reasons the judgment should be reversed and the complaint dismissed.

Cardozo, Ch. J.; Pound, Crane, and O'Brien, JJ., concur with Hubbs, J.; Lehman, J., dissents in opinion in which Kellogg, J., concurs.

Judgment affirmed.

Certificate to foregoing paper omitted in printing.

[fol. 32] In Supreme Court of New York, Appellate Division, Second Judicial Department

Lazansky, P. J.; Young, Kapper, Seeger, and Carswell, JJ.

Phœnix Indemnity Co., Plaintiff,

against

The Staten Island Rapid Transit Railway Company, Defendant

Submission of Controversy Upon an Agreed Statement of Facts under Sections 546-548 of the Civil Practice Act.

Jeremiah F. Connor, for the plaintiff.
Gardner Prime, for the defendant.

Opinion—Filed June 18, 1929

Seeger, J.:

Plaintiff is a domestic insurance corporation. Defendant is a domestic railroad corporation. On and prior to February 24th, 1927, Joseph Perroth was in the employ of one Anderson. Said Anderson, in compliance with the provisions of the New York Workmen's Compensation Law, had insured himself with plaintiff against liability for compensation for injury to his employees including said Perroth. On February 24th, 1927, while acting within the scope of his employment by said Anderson, said Perroth was struck by a train of the defendant, receiving injuries which caused his death solely by reason of the negligence of the defendant without any negligence of his contributing [fol. 33] thereto. Said Perroth left him surviving a dependent, his widow. Prior to the institution of this action, the administratrix of said Perroth brought suit against defendant herein to recover damages for the death of said Perroth. Said suit was settled and discontinued before trial by the defendant therein, which is this defendant herein, paying to said administratrix a sum in excess of the amount which said dependent widow, Perroth, would have been entitled to by way of compensation if claim had been made by her, pursuant to the New York Workmen's Com-

pensation Law, defendant receiving a general release therefor.

Thereafter, and prior to the institution of this action and pursuant to subdivisions 8 and 9 of section 15 of the New York Workmen's Compensation Law, two five hundred dollar awards were made in favor of the Treasurer of the State of New York jointly against said Anderson and plaintiff herein.

Subdivision 8 of said section 15 of the New York Workmen's Compensation Law provides among other things as follows:

"The insurance carrier shall pay to the state treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of five hundred dollars."

And subdivision 9 of said section 15 of the Workmen's Compensation law provides among other things as follows:

"The employer, or if insured, his insurance carrier, shall pay into the vocational rehabilitation fund for every case of injury causing death, in which there are no persons entitled to compensation, the sum of five hundred dollars. The state treasurer shall be the custodian of this special fund."

[fol. 34] Said awards were paid by plaintiff to the State Treasurer December 27th, 1927.

At the times mentioned, section 29 of the New York Workmen's Compensation Law provided as follows:

"* * * In case of the payment of an award to the state treasurer in accordance with subdivisions eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased."

The questions submitted to this court for decision are:

1. Under the above facts, was the State Treasurer entitled to the awards made in his favor and paid by plaintiff, as stated in Paragraphs 10 and 11, supra?

II. If the first question is answered in the affirmative, is plaintiff entitled to recover the amount of said awards from defendant by reason of Sec. 29 of the New York Workmen's Compensation Law?

The defendant contends that the State Treasurer was not entitled to said awards for the reason that there was a person entitled to compensation at the time of the death of said employee within the meaning of the statute in question, that said words "no persons entitled to compensation" mean no persons entitled to compensation at the death of the deceased, and that the aforesaid provision of Section 29 of the New York Workmen's Compensation Law, which gives to the insurance carrier liable for the award a cause of action for the amount of such payment in addi- [fol. 35] tion to any cause of action by the legal representatives of the deceased, takes the property of the defendant without due process of law and further violates the provisions of the State and Federal Constitutions guaranteeing equal protection before and under the law.

These provisions of subdivisions 8 and 9 of section 15 of the Workmen's Compensation Law have been passed upon by the Court of Appeals in Matter of McNamara v. New York State Railways (233 N. Y. 681, affirmed under the title New York State Railways v. Shuler, 265 U. S. 379). They have also been considered in Matter of Treasurer of the State of New York v. Niagara Falls Power Co. (241 N. Y. 521), a case quite similar to the one at bar, where it was held that an award should be made to the State Treasurer under subdivisions 7 and 8 of section 15 of the Workmen's Compensation Law. In Matter of Zirpola v. Casselman, Inc., (237 N. Y. 367) the Court of Appeals discussed the effect of section 29 of the Workmen's Compensation Law, and reference was made to the very provision of the section under which the present controversy arises, the court (Cardozo, J.) says:

"We are confirmed in this conclusion by a recent amendment which brings out into clear relief the meaning of the lawmakers. Since Travelers Insurance Co. v. Padula Company was decided, section 29 has been changed by the addition of the following provision: 'In case of the payment of an award to the state treasurer in accordance with sub-

divisions nine and ten of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such [fol. 36] payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased.' Subdivisions 9 and 10 of section 15 are to the effect that 'the insurance carrier shall pay to the State Treasurer for every case of injury causing death, in which there are no persons entitled to compensation, (i. e., to death benefits under the act) the sum of $500' (Matter of State Treasurer v. West Side Trucking Co., 233 N. Y. 202). Even though there are no such persons, no dependents in the narrow sense, the cause of action of the legal representatives is not to be affected. Return to the employer or carrier of the payments made into the treasury is to be 'in addition to any cause of action by the legal representatives of the deceased.' The recognition of a cause of action as possible in such conditions is equivalent to the recognition of its existence for the benefit of next of kin."

While the constitutionality of the provision now in question was not in issue in the Zirpola case, there is sufficient indication in the above quotations that the Court of Appeals had no doubt as to the propriety of this legislation.

In my judgment, the provisions of section 29 here involved should be upheld, and both questions submitted should be answered in the affirmative, and plaintiff should have judgment against defendant for the sum of $1,000., with interest from December 27, 1927, with costs.

[File endorsement omitted.]

Certificate to foregoing paper omitted in printing.

[fol. 37] IN COURT OF APPEALS OF NEW YORK

PHŒNIX INDEMNITY CO., Respondent,
ag'st
THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, Appellant

REMITTITUR—May 29, 1929

Be it remembered that on the 7th day of February, in the year of our Lord one thousand nine hundred and twen-

ty-nine, The Staten Island Rapid Transit Railway Company, the appellant in this cause, came here unto the Court of Appeals, by Cravath, deGersdorff, Swaine & Wood, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department, and Phœnix Indemnity Co., the respondent in said cause, afterwards appeared in said [fol. 38] Court of Appeals by Jeremiah F. Connor, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. Frederick H. Wood, of counsel for the appellant, and by Mr. Jeremiah F. Connor, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs. On the argument of the appeal the appellant contended that the statute under which its liability has been established was in violation of the Fourteenth Amendment of the Constitution of the United States in that it deprived the appellant of the equal protection of the laws and also deprived the appellant of property without due process of law. The Court considered this contention and overruled it.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, there to be proceeded upon according to law.

Therefore it is considered that the said judgment be affirmed with costs, *oc., oc.*, as aforesaid.

And hereupon, as well as the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Second Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the Justices thereof, &c.

[fol. 39] Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York.

Clerk's certificate to foregoing papers omitted in printing.

[fol. 40] IN SUPREME COURT OF NEW YORK

PHŒNIX INDEMNITY CO., Plaintiff,
against
THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, Defendant

JUDGMENT—Filed June 18, 1929

This proceeding having been commenced by the filing of an Agreed Statement of Facts in the Office of the Clerk of the County of Richmond, on or about the 2nd day of April, 1928, and the proceeding having been tried before the Appellate Division of the Supreme Court, Second Judicial Department, on the 12th day of June, 1928, and the said Appellate Division having rendered its decision adjudging that the plaintiff have judgment against the defendant for the sum of One thousand ($1,000.) Dollars, with interest from December 27th, 1927, with costs, and an Order and Judgment having been duly entered in the Office of the Appellate Division, Second Judicial Department, in the Borough of Brooklyn, City and State of New York, and a certified copy of said Order and Judgment having been filed in the Office of the Clerk of the County of Richmond, and a Judgment having been entered in the Office of the Clerk of the County of Richmond on October 22nd, 1928, in favor of the plaintiff and against the defendant in the sum of One thousand ninety-four and 33/100 ($1,094.33) Dollars, and the defendant having appealed to the Court of Appeals of the State of New York from said Order of the Appellate Division, and from said Judgment entered in the office of the Clerk of [fol. 41] the County of Richmond as aforesaid, and said appeal having come on to be heard, and the Court of Appeals having rendered its decision affirming said judgment with costs, and over-ruling the contention of the appellant that the statute under which its liability has been established was in violation of the Fourteenth Amendment of the Constitution of the United States in that it deprived the appellant of the equal protection of the laws, and also deprived the appellant of property without due process of law, and the Order and Proceedings of the Court of Ap-

peals having been remitted to the Appellate Division of the Supreme Court, Second Judicial Department, and an Order having been entered herein by the said Appellate Division, making the Judgment of the Court of Appeals the Judgment of this Court, and directing that judgment be entered accordingly with costs in the Court of Appeals in favor of the plaintiff and against the defendant, and a certified copy of said Order of the Appellate Division having been filed herein, and plaintiff's costs having been taxed herein,

Now, on motion of Jeremiah F. Connor, attorney for the plaintiff, it is hereby

Adjudged that said Judgment appealed from be and the same hereby is affirmed, and that the plaintiff, Phœnix Indemnity Co., recover of the defendant, The Staten Island Rapid Transit Railway Company the sum of $113.75 costs in the Court of Appeals as taxed, and have execution therefor.

Enter.

(Signed) James L. Vail, Clerk.

[File endorsement omitted.]

Certificate to foregoing paper omitted in printing.

[fol. 42] In Court of Appeals of New York

[Title omitted]

Petition for Appeal and Assignments of Error—Filed July 19, 1928

Considering itself aggrieved by the decision and judgment of the Court of Appeals of the State of New York in the above-entitled cause dated May 28th, 1929, and by the judgment entered thereon in the office of the Clerk of the Supreme Court of the State of New York, County of Richmond, on June 18, 1929, The Staten Island Rapid Transit Railway Company, the defendant, hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon.

And said The Staten Island Rapid Transit Railway Company, assigns the following errors in the record and proceedings in said case:

1. The Court of Appeals of the State of New York erred in holding constitutional that portion of Section 29, as amended, of Chapter 67 of the Consolidated Laws of the State of New York known as the Workmen's Compensation Law (Laws of 1922, Chapter 615) which reads:

[fol. 43] "* * * In case of the payment of an award to the state treasurer in accordance with subdivisions eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased. * * *"

and in not holding that said portion of said Section deprives Appellant of its property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

2. The Court of Appeals of the State of New York erred in holding constitutional, as construed by said Court, that portion of Section 29, as amended, of Chapter 67 of the Consolidated Laws of the State of New York known as the Workmen's Compensation Law, (Laws of 1922, Chapter 615) which reads:

"* * * In case of the payment of an award to the state treasurer in accordance with subdivisions eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased. * * *"

and in not holding that said portion of said Section, as construed by said Court, deprives Appellant of its property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

3. The Court of Appeals of the State of New York erred in holding constitutional that portion of Section 29, as amended, of Chapter 67 of the Consolidated Laws of the

[fol. 44] State of New York known as the Workmen's Compensation Law (Laws of 1922, Chapter 615), which reads:

"* * * In case of the payment of an award to the state treasurer in accordance with subdivisions eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased. * * *"

and in not holding that said portion of said Section deprives Appellant of the equal protection of the law in contravention of the Fourteenth Amendment to the Constitution of the United States.

4. The Court of Appeals of the State of New York erred in holding constitutional, as construed by said court, that portion of Section 29, as amended, of Chapter 67 of the Consolidated Laws of the State of New York known as the Workmens Compensation Law (Laws of 1922, Chapter 615), which reads:

"* * * In case of the payment of an award to the state treasurer in accordance with subdivisions eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased. * * *"

and in not holding that said portion of said Section as construed by said court deprives appellant of the equal protection of the law in contravention of the Fourteenth Amendment to the Constitution of the United States.

[fol. 45] For which errors the appellant prays that the said decision and judgment of the Court of Appeals of the State of New York dated May 28, 1929, and the final judgment entered thereon in the office of the Clerk of the Supreme Court of the State of New York, County of Richmond, on June 18, 1929, in the above entitled cause be re-

versed and judgment rendered in favor of said appellant, and for costs.

The Staten Island Rapid Transit Railway Company,
by Frederick H. Wood, Counsel.

Dated New York, N. Y., July 5th, 1929.

[File endorsement omitted.]

Certificate to foregoing paper omitted in printing.

[fol. 46] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 19, 1929

The appellant in the above-entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States, from the decision and judgment of the Court of Appeals of the State of New York dated May 28, 1929 and from the final judgment made and entered thereon in the above-entitled suit by the Supreme Court of the State of New York, County of Richmond, on the 18th day of June, 1929, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided; it is

Ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the said decision and judgment of the Court of Appeals of the State of New York and from the said final judgment entered thereon in the Supreme Court of the State of New York, [fol. 47] County of Richmond, as provided by law, and it is

Further ordered that the Clerk of the Supreme Court of the State of New York, County of Richmond, shall prepare and certify a transcript of the record, proceedings and judgment, including the opinion of the Court of Appeals of the State of New York, and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within thirty days of this date, and it is

Further ordered that security for costs on appeal be fixed in the sum of $500.

Dated July 9, 1929.

Benjamin N. Cardozo, Chief Judge of the Court of Appeals of the State of New York.

[File endorsement omitted.]

Certificate to foregoing paper omitted in printing.

[fol. 48] Citation, in usual form, Filed July 18, 1929, omitted in printing.

[fol. 49] Bond on Appeal for $500.00 approved and filed July 18, 1929, omitted in printing.

[fol. 50] IN SUPREME COURT OF NEW YORK

[Title omitted]

STIPULATION, RE TRANSCRIPT OF RECORD—Filed July 18, 1929

It is hereby stipulated and agreed by and between counsel for the respective parties hereto that the following are the only necessary papers in this action to be included in the transcript of the record to be certified and filed with the Clerk of the United States Supreme Court:

1. Agreed statement of facts with acknowledgments and affidavit of good faith annexed thereto.
2. The opinion of the Court of Appeals of the State of New York.
3. The opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department.
4. The decision and judgment of the Court of Appeals of the State of New York.
5. The judgment of the Supreme Court of the State of New York, County of Richmond, dated June 18, 1929.
6. Petition for appeal to the United States Supreme Court and Assignment of Errors.

[fol. 51] 7. Order allowing appeal.

8. Citation.
9. Bond.

Dated New York, July 17, 1929.

Jeremiah F. Connor, Counsel for Appellee. Frederick H. Wood, Counsel for Appellant.

[File endorsement omitted.]

Certificate to foregoing paper omitted in printing.

[fol. 52] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed Aug. 21, 1929

Comes now the appellant and adopts the errors assigned by it in its petition for appeal herein dated July 5, 1929, as the statement of the points to be relied upon by it on said appeal and represents that the whole of the record as filed and as stipulated by and between counsel herein by stipulation dated July 17, 1929, is necessary for the consideration of said points and therefore requests that the entire record so stipulated and filed be printed.

Dated New York, N. Y., August 20, 1929.

Frederick H. Wood, Counsel for Appellant. Office and Post Office address: 15 Broad Street, Borough of Manhattan, New York, N. Y.

To the Clerk of the Supreme Court of the United States; Jeremiah F. Connor, Counsel for Appellee, 80 Maiden Lane, Borough of Manhattan, New York, N. Y.

Service of the foregoing Statement of Points and Designation of Record is hereby acknowledged this 20 day of August, 1929.

Jeremiah F. Connor, Counsel for Appellee.

[fol. 53] [File endorsement omitted.]

[Endorsed on cover:] File No. 34,438. New York Supreme Court. Term No. 307. The Staten Island Rapid Transit Railway Company Appellant, vs. Phœnix Indemnity Co. Filed August 7, 1929. File No. 34,438.